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7

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA
10

11 GERALD HESTER, on behalf of himself and
all others similarly situated,
12

13 Plaintiff,

14 vs.

15 VISION AIRLINES, INC.,
16

Defendant.
17

CASE NO.: **2:09-CV-00117-RLH-RJJ**

**DEFENDANT VISION AIRLINES'
RESPONSE TO PLAINTIFFS
PREMATURELY FILED MOTION TO
COMPEL**

18 Defendant, Vision Airlines, Inc., by and through its counsel, James A. Kohl, Esq., of
19 the law firm Howard & Howard Attorneys PLLC, files this Response to Motion for
20 Sanctions. This Response is based on the Points and Authorities attached hereto together
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28

with the Papers and Pleadings on file herein and any oral argument received by the Court.

Dated this 28th day of January, 2014.

Howard & Howard Attorneys PLLC

/s/ James A. Kohl
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POINTS AND AUTHORITIES

I. INTRODUCTION

In Plaintiffs' rush to the Court rehashing old arguments against Vision they forgot two things. First, they miscalendared the date for Vision to respond. Second, Plaintiffs failed to have a meet and confer to discuss Vision's responses. Accordingly, the Court should deny Plaintiffs' motion with prejudice.

A. Meet and Confer Requirement Helps the Court by Eliminating Unnecessary Motions

The Federal Rules of Civil Procedure require parties to meet and confer prior to filing a motion to compel. *See* F.R.C.P. 26 (c) (protective orders). The meet-and-confer requirement is designed to encourage the parties to work out their differences informally so as to avoid the necessity for a motion and formal court order. The rule contemplates parties are conferring to reach a mutually acceptable solution to the problem. *Hunter v. Moran*, 128 F.R.D. 115 (D. Nev. 1989). When parties reach their own agreements they reduce the burden on the court and expenses for the litigants. *Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118 (D.Nev 1993). *Halas v. Consumer Services, Inc.*, 16 F.3d 161 (7th Cir. 1994); *First*

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Savings Bank, F.S.B. v. First Bank Sys., 902 F.Supp. 1356 (D. Kan. 1995). The meet and confer requirement furthers the mandate of N.R.C.P. 1 to secure the just, speedy and inexpensive determination of every action. *Shuffle Master v. Progressive Games*, 170 F.R.D. 166 (D.Nev. 1996).

B. The Meet and Confer Rule Requires Good Faith Efforts to Resolve the Dispute

The meet-and-confer rule requires the parties to make a good faith effort to resolve the dispute, without regard to technical interpretation of the language of the particular discovery request, determine what the requesting party is actually seeking and what specific genuine issues, if any, cannot be resolved prior to seeking judicial intervention. *Tri-Star Pictures v. Unger*, 171 F.R.D. 94 (S. D. N. Y. 1997). During the informal negotiations, the parties must present to each other the merits of their respective positions with the same candor, specificity and support, as they do when presenting their position to the Commissioner. "Only after all the cards have been laid on the table, and a party has meaningfully assessed the relative strengths and weaknesses of its position in light of all available information, can there be a 'sincere effort' to resolve the matter." *Nevada Power Co. v. Monsanto Co.*, *supra*, at 120; *Prescient Partners, L.P. v. Fieldcrest Cannon*, 1998 U.S.Dist. Lexis 1826 (S.D.N.Y. 1998).

C. To File a Discovery Motion, the Party Seeking Relief must File a Detailed Affidavit Demonstrating Their Good Faith Attempt to Resolve the Dispute

In order to satisfy the requirements of LR 26(7)(b) the movant must detail in an affidavit the essential facts sufficiently to enable the Magistrate Judge to pass preliminary judgment on the adequacy and sincerity of the good faith discussion between the parties. It must include the name of the parties who conferred or attempted to confer, the conference should be between the attorneys/parties - not delegated to secretaries or paralegals the manner

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1 in which they communicated, the dispute at issue, as well as the dates, times and results of the
 2 discussions, if any, and why negotiations proved fruitless. *Shuffle Master*, 170 F.R.D. 166.

3 The above steps in the conferment process must not only be done, but also be done in
 4 good faith; i.e., did the parties discuss the propriety of the asserted objections? Did they
 5 determine precisely what the requesting party was seeking and what information the
 6 responding party should reasonably supply? Did they converse, compare views and deliberate
 7 as to a solution? *Contracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456
 8 (D.Kan. 1999); *Deckon v. Chidebere*, 1994 U.S. Dist. Lexis 12778 (S.D.N.Y. 1994).

9
 10
 11 **D. Good Faith Requires Meaningful Discussion of the Dispute**

12 Good faith is tested, not just by the quantity of contacts, but the quality as well;
 13 further, it is adjudged according to the nature of the dispute and the reasonableness of the
 14 positions held by the respective parties, as well as any suggested compromise of those
 15 positions. The keys are honesty in one's purpose to meaningfully discuss the discovery
 16 dispute, freedom from intention to defraud or abuse the discovery process and faithfulness to
 17 one's obligation to secure information without court action. *Contracom Commodity Trading*
 18 *Co. v. Seaboard Corp.*, *supra*; *Prescient Partners, L.P. v. Fieldcrest Cannon*, *supra*.

19
 20
 21 **E. Failure to Comply with the Meet and Confer Requirements Results in the Denial of the Motion**

22 Failure to comply with the meet and confer requirement will often mean a denial of
 23 the discovery motion under ordinary circumstances. *See, e.g., Schick v. Fragin*, 1997 Bankr.
 24 Lexis 1250 (Bankr, S.D.N.Y. 1997); *Tri-Star Pictures v. Unger*; *supra*. The Court does have
 25 the discretion to consider a non-conforming motion on its merits. It will do so if the time for
 26 filing another motion has passed, compromise is unlikely, the responding party has opposed
 27 on the merits and movant would be unduly prejudiced by not receiving a ruling on the merits.
 28

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Pulsecard, Inc. v. Discover Card Services, Inc., 168 F.R.D. 295 (D.Kan. 1996); *Prescient Partners, L.P. v. Fieldcrest Cannon, Inc.*, *supra*; *Reidy v. Runyon*, 169 F.R.D. 486 (E.D.N.Y. 1997). However, it is more likely the motion would be stricken, *Dewitt v. Penn-Del Directory Corp.*, *supra*; *Townsend v. Superior Ct.*, *supra*; sanctions would be imposed, *Alexander v. FBI*, *supra*; or the parties sent back for a meaningful meet-and-confer, *Doe v. National Hemophilia Foundation*, 194 F.R.D. 516 (D. Md. 2000); *Nevada Power v. Monsanto*, *supra*.

F. **Plaintiffs Did Not Make a Good Faith Effort to Resolve this Dispute**

In the instant case there was no discussion of the merits of respective positions, nor any sincere effort to analyze the strengths and weaknesses of each party's position because the Motion was filed before Plaintiffs reviewed Visions' productions. The personal consultation required of the parties is supposed to be a substitute for and not merely a formalistic prerequisite to judicial resolution. *Shuffle Master v. Progressive Gaming*, *supra*; *Nevada Power v. Monsanto*, *supra*. Defendants did not file an affidavit stating what their efforts were to meet and confer because they made none. Plaintiffs made no real effort to "meet and confer" rather, they filed their motion before looking in the mail to review Visions responses. Because Defendants did not make any serious effort to meet and confer, the Court should deny the present motion to compel.

G. **Plaintiffs' Motion was Filed Prematurely**

Plaintiff moved this Court to sanction Vision based on Vision's alleged failure to provide it with discovery responses. On January 20, 2014 Vision served Plaintiffs with financial and tax records that were responsive to the discovery requests. See UPS tracking certificates for Florida Counsel attached as Exhibit 1 and Certificate of Mailing for local counsel attached as Exhibit 2. In their discovery, Plaintiffs sought Vision's bank records, real

1 estate records and title to vehicles (planes and automobiles). Vision produced its account
2 information. The documents were stamped as bates stamps VisionHH009067-
3 VisionHH011095. The documents were served on Local Counsel via us mail and to Florida
4 Counsel via courier on January 20, 2014. Fed. R. Civ. Pro. 6(a)(1)(C) states that time periods
5 “include the last day of the period” Accordingly, the Class’s motion is factually incorrect and
6 filed prematurely. Thus the Motion should be dismissed with prejudice. Moreover, Vision
7 supplemented the production by providing copies of the titles to the vehicles on the 21st. See
8 Exhibit 3. Vision does not own real property nor does it own any airplanes, thus there were
9 no documents that were responsive to those requests. Finally, Vision has identified the
10 contract that it currently receives revenue from. However, that contract and its proceeds are
11 subject to the blanket lien of the International Bank of Commerce.
12

13
14 H. Conclusion

15 Plaintiffs filed the Motion prematurely, failed to meet and confer and failed to
16 inform the Court that Vision has in fact provided it with the financial records that they were
17 seeking. Accordingly, the Motion should be denied with prejudice.
18

19
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CERTIFICATE OF ELECTRONIC FILING
AND CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on the 28th day of January, 2014, I electronically filed a true and correct copy of the foregoing document with the Clerk of this Court using the CM/ECF system, which sent notification of such filing to the following:

Brett von Borke
Kenneth Ralph Hartmann
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/s/ Stephanie T. George
An employee of Howard & Howard Attorneys PLLC

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EXHIBIT 1



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
Track Shipments

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Tracking Number: 1Z 6EA 001 13 9064 965 2
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Type: Package
Status: **Delivered** 
Delivered On: 01/21/2014 12:03 P.M.
Delivered To: CORAL GABLES, FL, US
Signed By: CORTES
Service: NEXT DAY AIR SAVER

Tracking Number: 1Z 6EA 001 13 9018 184 4
[→View package progress](#)

Type: Package
Status: **Delivered** 
Delivered On: 01/21/2014 11:54 A.M.
Delivered To: CORAL GABLES, FL, US
Signed By: MARTINEZ
Service: NEXT DAY AIR SAVER

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Package

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This page shows the shipment history details for the shipment you selected.

1 Address Information

Ship To:
GROSSMAN ROTH, P.A.
BRETT VON BORKE,
ESQ.
2525 PONCE DE LEON
BLVD.
SUITE 1150
CORAL
GABLES FL 331346040

Ship From:
HOWARD & HOWARD-
LAS VEGAS
STEPHANIE GEORGE
3800 HOWARD HUGHES
PARKWAY
STE. 1000
LAS VEGAS NV 89169
Telephone:7022571483
x4800

Return Address:
HOWARD & HOWARD-
LAS VEGAS
STEPHANIE GEORGE
3800 HOWARD HUGHES
PARKWAY
STE. 1000
LAS VEGAS NV 89169
Telephone:7022571483
x4800

2 Package Information

Tracking Number	Weight	Dimensions / Packaging	Declared Value	Reference Numbers
1. 1Z6EA0011390181844	0.5 lbs (Letter billable)	UPS Letter		Client Matter # - 108527-0000 1 Attorney Name - KOHL

3 UPS Shipping Service and Shipping Options

Service:
UPS Next Day Air Saver

4 Payment Information

Bill Shipping Charges to:
Shipper's Account 6EA001

You are not authorized to view rates information.All Shipping Charges in USD

5 Printing Preferences (for View/Print Receipt)	
<input checked="" type="checkbox"/> Use my UPS thermal printer to print receipts	
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 Type: Package
 Status: **Delivered** [Proof of Delivery](#)
 Delivered On: 01/21/2014 11:54 A.M.
 Signed By: MARTINEZ
 Location: MAIL ROOM
 Delivered To: 2525 PONCE DE LEON BLVD
 1150
 CORAL GABLES, FL, US 33134
 Shipped/Billed On: 01/20/2014
 Reference Number(s): 108527-00001, KOHL
 Service: NEXT DAY AIR SAVER
 Weight: .50 Lb

Package Progress

Location	Date	Local Time	Description
MIAMI, FL, US	01/21/2014	11:54 A.M.	Delivered
	01/21/2014	7:53 A.M.	Destination Scan
	01/21/2014	6:34 A.M.	Arrival Scan
	01/21/2014	6:34 A.M.	Late airplane.
LOUISVILLE, KY, US	01/21/2014	4:13 A.M.	Departure Scan
	01/21/2014	1:23 A.M.	Arrival Scan
LAS VEGAS, NV, US	01/20/2014	7:05 P.M.	Departure Scan
	01/20/2014	6:43 P.M.	Arrival Scan
	01/20/2014	6:30 P.M.	Departure Scan
	01/20/2014	5:31 P.M.	Origin Scan
	01/20/2014	4:58 P.M.	Pickup Scan
US	01/20/2014	7:24 P.M.	Order Processed: Ready for UPS

Tracking results provided by UPS: 01/27/2014 12:02 P.M. ET

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1

Address Information

Ship To:

KOZYAK TROPIN &
 THROCKMORTON,
 KENNETH R.
 HARTMANN, ESQ.
 2525 PONCE DE LEON
 BLVD.
 CORAL
 GABLES FL 331346037

Ship From:

HOWARD & HOWARD-
 LAS VEGAS
 STEPHANIE GEORGE
 3800 HOWARD HUGHES
 PARKWAY
 STE. 1000
 LAS VEGAS NV 89169
 Telephone:7022571483
 x4800

Return Address:

HOWARD & HOWARD-
 LAS VEGAS
 STEPHANIE GEORGE
 3800 HOWARD HUGHES
 PARKWAY
 STE. 1000
 LAS VEGAS NV 89169
 Telephone:7022571483
 x4800

2

Package Information

3

UPS Shipping Service and Shipping Options

Service:

UPS Next Day Air Saver

4

Payment Information

Bill Shipping Charges to:

Shipper's Account 6EA001

You are not authorized to view rates information.All Shipping Charges in USD

5 Printing Preferences (for View/Print Receipt)	
<input checked="" type="checkbox"/> Use my UPS thermal printer to print receipts	
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Tracking Number: 1Z 6EA 001 13 9064 965 2
 Type: Package
 Status: **Delivered** [Proof of Delivery](#)
 Delivered On: 01/21/2014 12:03 P.M.
 Signed By: CORTES
 Location: MAIL ROOM
 Delivered To: 2525 PONCE DE LEON BLVD
 9
 CORAL GABLES, FL, US 33134
 Shipped/Billed On: 01/20/2014
 Reference Number(s): 108527-00001, KOHL
 Service: NEXT DAY AIR SAVER
 Weight: .50 Lb

Package Progress			
Location	Date	Local Time	Description
MIAMI, FL, US	01/21/2014	12:03 P.M.	Delivered
	01/21/2014	7:53 A.M.	Destination Scan
	01/21/2014	6:34 A.M.	Arrival Scan
	01/21/2014	6:34 A.M.	Late airplane.
LOUISVILLE, KY, US	01/21/2014	4:13 A.M.	Departure Scan
	01/21/2014	1:23 A.M.	Arrival Scan
LAS VEGAS, NV, US	01/20/2014	7:05 P.M.	Departure Scan
	01/20/2014	6:43 P.M.	Arrival Scan
	01/20/2014	6:30 P.M.	Departure Scan
	01/20/2014	5:31 P.M.	Origin Scan
	01/20/2014	4:58 P.M.	Pickup Scan
US	01/20/2014	7:25 P.M.	Order Processed: Ready for UPS

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EXHIBIT 2

PROOF OF SERVICE

I, Stephanie T. George, declare:

I am a citizen of the United States and employed in Las Vegas, Nevada. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, NV 89169. On January 20, 2014, I served a copy of the within document(s): **DEFENDANT'S SUPPLEMENTAL TO FRCP**

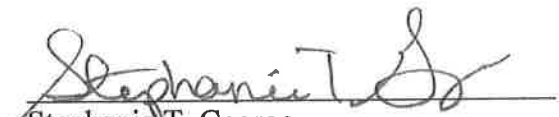
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Ross C. Goodman, Esq, Goodman Law Group 520 S Fourth Street 2nd Floor Las Vegas, NV 89101	

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

Executed on January 20, 2014, at Las Vegas, Nevada.


Stephanie T. George

Howard & Howard Attorneys, PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
(702) 257-1483

EXHIBIT 3

PROOF OF SERVICE

I, Stephanie T. George, declare:

I am a citizen of the United States and employed in Las Vegas, Nevada. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 3800 Howard Hughes Parkway, Suite 1000, Las Vegas, NV 89169. On January 23, 2014, I served a copy of the within document(s): **DEFENDANT'S SUPPLEMENTAL TO FRCP**

26(a)(1) INITIAL DISCLOSURES

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Kenneth R. Hartmann, Esq.
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Coral Gables, FL 33134

Ross C. Goodman, Esq.
Goodman Law Group
520 S Fourth Street
2nd Floor
Las Vegas, NV 89101

I declare under penalty of perjury under the laws of the State of Nevada that the above is true and correct.

Executed on January 23, 2014, at Las Vegas, Nevada.


Stephanie T. George

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